difficult, and makes larger demands upon the ready learning and mental resources of the profession, than that which has come into vogue in the American courts, where the counsel sometimes prepares a brief of fifty or more closely printed pages, and feels bound to read, if not to discuss, the whole extent of it before the court. Under such circumstances he feels himself almost unfairly treated if the court interrupt him by impertinent questions, and he naturally supposes that they are becoming impatient. The court have no alternative but to sit quietly, and endeavor to keep up the appearance of listening.

The arguments before the Law Lords, on appeals to the House of Lords, are more formal, and less conversational, than in most of the other English courts. But there is one practice at the English bar which tends very much to increase the interest of law arguments—the same counsel very seldom reargue a cause, either in the same or an appellate court. I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Court of Maine.

ELLEN WILSON v. GRAND TRUNK RAILWAY COMPANY.

The holder of a railway passenger ticket is only entitled to passage with such personal baggage as he carries with him at the time. Baggage sent by an after train will be at his risk, and not that of the company.

APPLETON, C. J.—The plaintiff was a passenger on board the defendants' cars, having seasonably paid her fare. Her baggage was not with her, it having been left behind without any fault of the defendants. Some two or three days afterwards it was left in the charge of their servants to be transported to the Empire station, on their line, but it never reached its place of destination. This suit is brought to recover the value of the baggage lost.

The presiding judge instructed the jury, "that, if they should find that the plaintiff went on board the defendants' road as a passenger on Tuesday preceding without baggage, and that the trunk and its contents were ordinary personal baggage, such as a passenger would be entitled to take without extra charge, it was not necessary there should be proof that anything was paid for

carrying the trunk between the same points; that the price paid by the plaintiff for her own passage, and the evidence in the case, if found to be true, were sufficient consideration for the promise alleged in the writ."

As the plaintiff's trunk was taken for transportation some days after she had passed over the defendants' road, the substance of the charge of the presiding judge was, that the price paid by the plaintiff for her ticket included the compensation due to the defendants for their subsequent transportation of her trunk—the trunk and its contents being personal baggage. In other words, it was not necessary that the baggage of the passenger should go with the passenger, but that it might be forwarded subsequently and without any additional charge for its freight.

The fare for the passenger includes compensation for the carriage of his baggage, as to which the carriers of passengers are to be regarded as common carriers. There need be no distinct contract for the carriage of the baggage. The fare of the passenger covers the compensation for the freight of the baggage. The baggage must be ordinary baggage, such as a traveller takes with him for his personal comfort, convenience, or pleasure for the journey. It must be the "ordinary baggage" of a traveller, regard being had to the journey proposed.

It is implied in the contract that the baggage and the passenger go together. "The general habits and wants of mankind," observes ERLE, C. J., in *Phelps* v. *L. and N. W. Railway Co.*, 115 E. C. L. 327, "must be taken to be in the mind of a carrier when he receives a passenger for conveyance; and the law makes him responsible for all such things as may be fairly *carried by the passenger* for his personal use." In *Cahill* v. *L. and N. W. Railway Co.*, 100 E. C. L. 172, WILLES, J., says: "Where a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only; and that he no more extends the contract to the conveyance of a single package of merchandise than of his entire worldly possessions." In *Smith* v. *Railroad Co.*, 44 N. H. 330, BELLOWS, J., uses the following language: "Until a comparatively recent period, the English courts were inclined to hold that carriers of passengers by stage-coaches and otherwise, were not liable for injuries to their baggage, unless a distinct price was paid

for its transportation. But it is now well settled that the price paid for the passenger includes also the personal baggage required for his personal accommodation; the custody of the baggage being regarded as accessory to the principal contract. * * In general terms it may include not only personal apparel, but other conveniences for the journey, such as a passenger *usually has with him* for his personal accommodation." "The baggage," observes MULLIN, J., in *Merrill* v. *Grinnell,* 30 N. Y. 619, "must be such as is necessary for the particular journey that the passenger is, at the time of the employment of the carrier, actually making."

It follows from the nature and object of the contract that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey. As it is for his use and convenience, it must necessarily be with him as it is for him. He may reasonably be expected to exercise some supervision over it during and be ready to receive it at the expiration of his journey. In the present case the baggage of the plaintiff was forwarded two days after she had passed over the road. If its transmission may be delayed two days and the carrier is required to take it without any compensation save the fare paid by the passenger who had preceded it, it may equally be delayed weeks or months, and the carrier be required to forward it without any additional pay. It presents a different question when the delay is caused by the fault of the carrier or there is a special agreement with him or his agent for the subsequent transportation of the passenger's baggage.

The fare paid by the passenger over a railroad is the compensation for his carriage and for the transportation, at the same time, of such baggage as he may require for his personal convenience, pleasure, and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier or of negligence on his part, is liable, like any article of merchandise, to the payment of the usual freight.

Exceptions sustained.

The foregoing opinion unquestionably places the case upon the true ground—that in the absence of all contract or consent on part of a railway company, they are under no additional duty or obligation to a passenger by reason of his purchase of his ticket beyond that of safely carrying him to the point indicated on the ticket, together with such personal baggage as he may find it for his convenience to carry with him, not exceeding the limit fixed by the rules and regulations of the

company. There can be no possible question that, aside from special circumstances indicating the actual or implied consent of the company to allow the baggage of the passenger to go upon a different train from that on which the passenger himself goes, there is no obligation whatever to carry the baggage at all, except in the usual mode for special compensation. It is of the very essence of the implied stipulation on the part of the company to carry a reasonable amount of personal baggage with their passengers, that it shall go upon the same train with them. The care which the passenger himself exercises over the baggage is of the greatest importance to its security. In England, when the passenger changes from one main line to a branch line, in order to reach another main line, he is always expected to point out his baggage, and if he do not, is specially inquired of if he have any, and if so, requested to point it out, and if he fail to do it, is sure to fail of finding his luggage at the end of his route. Under such circumstances there would not be the slightest safety in trusting luggage to go by any mere passenger train without some one to look after it. Perhaps this uncertainty is somewhat peculiar to England, or the United Kingdom of Great Britain, since here the companies never give any check for luggage, as they call it, while upon the Continent the companies all give formal receipts or bills of lading for baggage, and checks are also given by our companies which have the same force.

This consideration of giving a check or bill for the baggage is of some importance in regard to the responsibility of the companies. As a general thing, railway companies never do this, except in connection with a ticket for passage. In all other cases, the baggage must go by express, or by the parcels office, as the expresses are called in Europe. We think most railway companies would scout the idea of sending baggage by passenger trains, separate from the passengers, as the height of absurdity, unless, perhaps, where the company had been in fault in not forwarding it at the proper time, or by having sent it in the wrong direction. But there is no doubt it would be entirely competent for the company to assume a special undertaking of this character. And where the servants of the company, being informed of the fact that the passenger did not intend going by the same train, in consequence of being delayed, or having gone before, or for any other reason, understandingly accept baggage, to go in the passenger train, without any accompanying passenger, we are not prepared to say that the payment of the price of transportation should make any difference in regard to the duty or responsibility of the company. It is hardly to be supposed that the company would undertake any such office as a mere gratuity, unless for some of its officers, agents, or employees. The very fact of undertaking the duty by the servants of the company, without any additional compensation, would seem to indicate very clearly that they understood the service was compensated by the fare paid by the passenger. How far the servants and employees of a railway company could fairly be regarded as acting within the scope of their employment in making such an extraordinary contract, seems to us very questionable. Unless the company had been in fault in regard to the transportation, so that it had become their duty to see it carried, and their servants were therefore strictly in the line of their duty in forwarding it, in which case they would unquestionably have the power to bind the company in selecting the mode of conveyance; unless this or some exceptional case were presented, it seems to us, as we said, very questionable how far the servants of a railway company could be said to act within the scope of

their authority in forwarding baggage by passenger train without the owner going at the same time. It is certainly well understood by all persons at all conversant with the subject (and all who deal with servants are bound to learn the general course of the business), that this is not the common course of forwarding baggage; and that being so, any one desiring to have his baggage forwarded in that mode must be assumed to understand that this is not within the ordinary scope of the servants' employment, and by consequence, that they have no authority to bind the company by any such undertaking.

But if the general superintendent of the railway should direct the servants of the company, in a particular instance, to forward baggage in this mode, and to give a check accordingly, it does not seem to us that this ought to be regarded as a gratuitous undertaking, and so not binding the company as common carriers. We should certainly regard them, in that precise case, as common carriers for hire, although no separate price was paid for the baggage, but only the ordinary fare for the passenger and his baggage. It seems to us more natural to treat the contract of the company as only extending to the waiver of their right to have the baggage go in the same train with the passenger, than to the waiver of all compensation for the transportation, that being at variance with the entire scope of their creation and action; the other being only a modification in a very slight but not altogether unimportant particular. I. F. R.

Supreme Court of Missouri.

GILES F. FILLEY, RESPONDENT, *v.* A. D. FASSETT ET AL., APPELLANTS.

The complainant having first appropriated and applied the name of "Charter Oak" to a certain pattern of stoves manufactured and sold by him, will be protected by injunction in the exclusive use of the name as a trade-mark.

Any contrivance, design, device, name, or symbol, which points out the true source and origin of the goods to which it is applied, or which designates the dealer's place of business, may be employed as a trade-mark, and the right to its exclusive use will be protected by the courts.

The appropriation of any prominent, essential, or vital feature of a trade-mark by another, is an infringement. If the trade-mark is simulated in such manner as probably to deceive customers, the piracy may be checked by injunction.

The statute of Missouri providing for the filing of a description of any trade-mark sought to be used, was not designed to abridge or weaken the right to any trade-mark which may be acquired in the usual way. It does not authorize the appropriation by one party of a trade-mark the title and ownership of which belongs to another.

APPEAL from St. Louis Circuit Court.

In 1851 the plaintiff employed N. S. Vedder, stove-pattern maker of Troy, N. Y., to design and construct for him a set or series of cooking-stove patterns. The patterns were made as

ordered, and in a form which resulted in the production of a cooking-stove of a new and improved interior arrangement and construction, for which Vedder obtained letters patent, which he assigned to the plaintiff. The plaintiff originated and applied to the stove the name "Charter Oak," which was so formed upon the patterns as to produce the name upon the manufactured article, in combination with a sprig of oak leaves. This name and device was employed to distinguish and designate cooking-stoves of the plaintiff's manufacture. The manufacture and sale commenced the following year, and has been followed up continuously ever since.

The testimony showed that stoves are usually known in the trade by their distinctive names, such as "Excelsior," "Climax," "Empire," "Charter Oak," &c.; and that they are advertised and bought and sold by such names and designations; that when a stove is favorably received and acquires popularity in the market, the peculiar name by which it is known becomes a matter of importance to the manufacturer, and of great value to him in the prosecution of his business.

The answer denied that the plaintiff first appropriated and used that name in such connection, as indicating the source and origin of the article to which it was applied; and denied that his use of it had been either exclusive or uninterruptedly continuous; and averred that the contrary of all this is true.

C. L. R. Moss, for appellants.

Samuel S. Boyd, for respondent.

The opinion of the court was delivered by

CURRIER, J.—Upon the issues a large mass of testimony was taken, from which the following facts are deduced:—

1. That the plaintiff's appropriation of the name "Charter Oak," as already detailed, was prior in point of time to any similar use of that name by any other parties. The testimony is clear and entirely satisfactory on this point.

2. That notwithstanding such appropriation by the plaintiff, different manufacturers in Cincinnati, and in that region, at different times subsequently to 1852, applied the same name to cooking-stoves of their manufacture, but without the consent of the plaintiff in any instance, and without his knowledge, except

in two instances. The first of these two occurred in 1854, and was at once checked by the plaintiff, and abandoned by the Cincinnati manufacturer on being apprised of the plaintiff's rights. The other is that of the manufacture of stoves, the sale of which, with the plaintiff's alleged trade-mark upon them, is sought to be enjoined by this suit; and the suit was commenced immediately after the facts came to the knowledge of the plaintiff.

3. That J. S. & M. Peckham, of Utica, Oneida county, N. Y., manufactured in Utica a "Charter Oak" cooking-stove, from 1852 to 1857, and then abandoned it, and never after resumed the manufacture of that particular stove. The Peckhams purchased their patterns for this stove of said N. S. Vedder, Filley consenting to the sale on condition certain alterations were first made in the patterns. This transaction does not appear to have included specifically the right to use the plaintiff's trade-mark, nor does it appear that Filley was ever made aware that the purchasers in fact used it. The design of the stove was patented, and the transaction with the Peckhams involved the granting to them the right to manufacture in Oneida county its patented features. That, with the right to sell in a defined territory, would seem to have constituted the inducement to the purchase of these patterns rather than others. The particular name which the plaintiff had originated for the stove which he proposed to make does not appear to have been mentioned in the negotiations with the Peckhams, or to have been in the minds of the parties. It ought not therefore to be inferred from the mere permission granted to Vedder to sell the modified patterns that the plaintiff licensed or sold out the use of his trade-mark, particularly in a contest with third parties, the Peckhams themselves disavowing all right, claim, or interest in the trade-mark, either as originators or purchasers.

4. That the plaintiff's use of the trade-mark claimed by him has been continuous and uninterrupted since the first adoption by him to the present time.

The fact that parties in Cincinnati or elsewhere manufactured "Charter Oak" stoves and sent them into the market to compete with the plaintiff's manufactures, in no way aids the defence, unless it appears that the plaintiff assented to or acquiesced in such infringements upon his rights; and, as already indicated, there is nothing in the case to establish a dedication or abandon-

ment to the public on the part of the plaintiff of his supposed rights of property in the alleged trade-mark. There is no testimony having that tendency, except the transaction with the Peckhams, and that is insufficient. In *Gillott* v. *Esterbrook*, 47 Barb. 455, it appeared that an imitation of the plaintiffs' mark had been in use for many years, and that for twenty years he had issued printed "cautions" to the public on the subject, implying knowledge on his part of such use, but that was held no acquiescence, although the plaintiffs had neglected to institute prosecutions.

The depredations of others on plaintiff's rights furnish no excuse to the defendants for similar acts on their part. It is rather an aggravation to the plaintiff that others have also injured him. And courts have not shown any disposition to encourage that line of defence. WOODBURY, J., in *Taylor* v. *Carpenter*, 2 Wood. & Minot 8, held this language: "There is something abhorrent in allowing such a defence to a wrong which consists in counterfeiting others' marks and stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruit of their good name, merely because they have shown forbearance and kindness." See observations of STORY, J., same case, 3 Story's R. 464.

After this suit was commenced, Rosenbaum & Co., who seem to be the real parties defending against the action, made an attempt to appropriate the disputed trade-mark to their own use, in due form of law, by filing in the office of the recorder of deeds in the county of St. Louis a written claim thereto, under the Act of March 1866, Gen. Stat. 912. A certified copy of the paper so filed, declaring that said Rosenbaum & Co. had adopted "Charter Oak" as their trade-mark for stoves manufactured by them was given in evidence, and relied upon as showing their title to the trade-mark as against Filley, who had never filed any such document. If this proceeding can be made available for the purpose intended, it may be regarded as an entirely new and improved method of disposing of trade-mark cases, and of appropriating the property of others, the subject of such suits, without risk or inconvenience, and at very slight cost.

A glance at the statute, however, shows that it was intended for no such purpose. It was not designed in the slightest particular to weaken or abridge any existing rights, or any future right to a trade-mark which might be acquired in the usual way,

or to legalize in any form or measure piracy in trade-marks. Property in a trade-mark is acquired at common law only by appropriation and use, and then only of such names, words, and devices as may be held to be adapted to point out the true source and origin of the goods to which such marks are applied. The statute widens the range of selection, and authorizes the mechanic or manufacturer to adopt any name or device he pleases, and to foreclose any controversy on the subject by writing out and filing with the recorder, as the law provides, an accurate description of the name, device, &c., that may have been chosen. But such paper is to be filed in the county where the goods, &c., are to be manufactured or prepared. It is not perceived how this can be made to apply to Rosenbaum & Co.'s stoves, which are manufactured in another state. The statute has no application to the facts of the present litigation. Nor will any fair construction of it warrant the appropriation by one party of an existing trade-mark, the title and ownership of which is in another party.

But it is objected that the words "Charter Oak," with the accompanying device, lack the requisite ingredients or characteristics of a trade-mark, and therefore it is insisted that the plaintiff could acquire no exclusive right to their use for that purpose.

The books are full of authority establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it; that is, to point out the true source and origin of the goods to which said mark is applied; or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves. Thus it has repeatedly been held that where the name or device employed had, from use or other cause, come to be descriptive of the goods manufactured or sold, their quality and use, such name or device was ineffectual and could not be upheld as a trade-mark. It was so as to the letters "A. C. A.," in the leading and famous case of *The Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. R. 599, as also in *Stokes* v. *Landgraff*, 17 Barb. 608, and in various other cases cited by the defendants. But these authorities have no application to the mark claimed by the plaintiff. For the

name "Charter Oak," with the combined device, in no possible view or application of them, are either descriptions or suggestive of the style, character, or qualities of a cast-iron cooking-stove. In their natural significancy, import, or symbolism, or in the use made of them prior to the plaintiff's appropriation of them as a trade-mark, they were as far removed as can well be imagined from conveying any such application or meaning. And that constitutes one of their virtues as a trade-mark: *Fetridge* v. *Merchant*, 4 Abb. Prac. R. 158; 6 Beav. 66; 4 McLean 516.

The general rule respecting the characteristics of trade-marks has already been given. The following names and designations, among many others, have been held to come within that rule. As pointing to a hotel, "Irving House," (3 Sand. S. C. 726); "Revere House," (7 Cush. 322). As pointing to a manufacturer or dealer, "Cocoaine," (9 Bosw. 192); "Howe," (50 Barb. 236); "Akron," the name of a town, (19 Barb. 599); "London Conveyance Company," (2 Keene 220); "303," the designation of a particular pen, (47 Barb. 471); "Bell's Life," the name of a newspaper, (22 Law Rep. 428); "Roger Williams Long Cloth," (6 R. I. 434); "Day & Martin," (7 Beavan 89).

The name and device selected by the plaintiff were adopted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark. By the adoption and use of that mark he acquired a property interest therein which the courts will protect. Have the defendants invaded the rights of the plaintiff in this behalf?

The defendants accumulated in the St. Louis market a quantity of the Rosenbaum & Co. stoves, with the name "Charter Oak" upon them, which they held for sale as "Charter Oak" stoves. They were aware of the plaintiff's proprietorship of the "Charter Oak" trade-mark, and were proceeding to sell in defiance of plaintiff's rights.

In this condition of things the present suit was instituted and an injunction granted restraining the defendants from the proposed sale. The only question raised on this branch of the case is, whether the use of the name "Charter Oak," separated from the other parts of the plaintiff's mark, amounted to an infringement of his rights, assuming his ownership of the name as a trade-mark in combination with the device of oak leaves.

On this point there can be no reasonable doubt. The plaintiff's stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself. That was the conspicuous element in the mark. By that name the stove was bought and sold, and known in the Western and Southern markets. It was the prominent essential and vital feature of the plaintiff's trade-mark. That name the defendants and their principals appropriated bodily, and applied it to their stoves, and sought to acquire the sole and exclusive use of it by filing their claim in the recorder's office under the statute. That shows their appreciation of the value of the name, and of their purpose not only to use it themselves, but to exclude the originator of it from its use. Granting Filley's exclusive right, there can be no doubt that the things done and purposed by the defendants were of injurious tendency, and that the name "Charter Oak," as employed by them, was eminently calculated to mislead buyers as to the true source and origin of the stove to which the defendants applied that name. If the name as used by them was calculated to mislead, the intention to deceive is to be inferred therefrom: *Fetridge* v. *Merchant*, 4 Abb. Pr. R. 159; 4 Mann. & Gr. 385.

The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has, in fact, been deceived; or that the party complained of made the goods: 2 Sand. S. C. 607; 25 Barb. 79; 23 Eng. L. & E. 53–4; 2 Sand. Ch. 597. Nor is it necessary to prove intentional fraud. "If the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction:" 4 McLean 519; 2 Barb. Ch. 103.

The result is, that the judgment of the Circuit Court must be affirmed.

The other judges concur.

The right of a party to protection in the use of his trade-mark, meaning thereby any "names, signs, marks, brands, labels, words, or devices of any kind, which can be advantageously used to designate his goods," though of comparatively recent origin in its fulness and perfection, was foreshadowed as early as the time of the Year Books, in the case of *Sothern* v. *How*, 2 Croke 468.

Although the recognition of this right by courts of equity, and its consequent

protection by injunction, was at a much later period, it is now so firmly established by the highest authority as a proper subject for the exercise of the restraining control of that court, whenever violated, that it is no longer an open question: *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. 606.

A trade-mark may, in its elementary signification, be applicable to a great variety of forms, marks, or symbols designating the origin or ownership of the thing to which it is applied.

For instance, the title "Irving House" having been used by a person for three years only, as a name of his hotel, an injunction was granted against a party setting up a hotel and calling it by the same name: *Howard* v. *Henriques*, 3 Sandf. S. C. 726.

The same principle was held in respect to the name "Revere House" when applied to coaches: *Marsh* v. *Billings*, 7 Cush. 322.

"Cocoine," as a name of hair oil, held to be an infringement on "Cocoaine;" and this, too, though the ingredients of the oil were open to the use of all: *Burnett* v. *Phalon*, 9 Bosw. 192.

Held by the court that A. B. Howe had such an exclusive right to the use of the word "Howe" as a trade-mark, placed by him upon a sewing machine sold by him under a license from E. Howe, Jr., the patentee, that E. Howe, Jr., could be restrained from using it as such: *Howe* v. *Howe Machine Co.*, 50 Barb. 236.

Parties making lime at the town of Akron were held entitled to use the word "Akron" as a trade-mark, and an injunction was granted against the defendants who marked their lime with this word: *Newman* v. *Alvord*, 49 Barb. 588.

The number "303" was held to be a proper subject for a trade-mark of pens, and its use was restrained by injunction: *Gillott* v. *Esterbrook*, 47 Barb. 455.

The term "London Conveyance Co.," as the name of an omnibus company, was upheld as a trade-mark in *Knott* v. *Morgan*, 2 Keene 220.

"Sykes' Patent" as a trade-mark for shot-bolts was sustained by injunction against a party of the same name, and that, too, though the party had a perfect right to make the identical article, there being in fact no patent: *Sykes* v. *Sykes*, 3 Barn. & Cress. 543.

"Penny Bell's Life," the name of a newspaper, was restrained as an infringement of "Bell's Life," in *Clement* v. *Maddick*, 22 Law Rep. 428.

"H. H. 6," as a trade-mark of ploughs, was upheld: *Remson* v. *Bental*, 3 Law Jour. N. S. 161.

"Seixo," as a brand for wine, was sustained: *Seixo* v. *Provezende*, 1 Chan. App. Cas. 184.

"Roger Williams Long Cloth" was upheld, and those using "Roger Williams" as a designation of cotton cloth were restrained: *Barrows* v. *Knight*, 6 R. I. 434.

"Anatolia," as a brand for liquorice, was sustained in *McAndrews* v. *Bassett*, 10 Jurist N. S. 550, though it was argued that the word being common to all there could be no property in it; Lord WESTBURY saying: "property in a word for all purposes cannot exist, but property in a word as applied by way of stamp upon a stick of liquorice does exist the moment the liquorice gets into the market so stamped."

In *Pidding* v. *Howe*, 8 Simons 477, the name used was "Howqua Mixture;" and the court said: "The defendant, finding that the plaintiff's mixture was in considerable demand, had recently begun to sell a mixture of his own under the same designation. I apprehend that *primâ facie* the defendant was not at liberty to do that."

In *Goutt* v. *Aleploglu*, 6 Beavan 69, the court restrained the defendant from using the Turkish word "Pessendede," meaning "warranted or approved," on

watches made by him, the plaintiff having long used such word as a mark for his watches.

In *Croft* v. *Day*, 7 Beavan 89, "Day & Martin," as a trade-mark for blacking, was sustained against a firm, the real name of which was Day & Martin.

"Bismarck" as name of paper collars, was upheld in *Messerole* v. *Tynberg*, 4 Abb. Pr. N. S. 414, the court remarking: "There is no reason for making any distinction between a common word or term used for an original purpose, which has accomplished its object, and a new design adopted by a manufacturer."

In *Farina* v. *Silverlock*, 39 Eng. Law & Eq. 517, an injunction was granted against the engraver who made simulated labels to sell to third parties.

There seems to be no more restriction against the choice of a name for a trade-mark than the choice of a symbol. It is sufficient that the name in its application to the goods be so far original and peculiar as to be capable of distinguishing when known in the market one manufacturer's goods from those of another: *Ainsworth* v. *Walmsley*, 1 Law Rep. Eq. Cas. 252; *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. 605; *Newman* v. *Alvord*, 49 Barb. 592; *Williams* v. *Johnson*, 2 Bosw. 1.

A party being fully possessed of this right of property in his trade-mark, will not be held to have waived such right by reason of his neglect to restrain others from its use. "It is no excuse that others have used or are using such trade-mark:" *Taylor* v. *Carpenter*, 3 Story 462; *Coates* v. *Holbrook*, 2 Sandf. Ch. 596; *Taylor* v. *Carpenter*, 2 Wood. & Min. 8.

Where the use by others is with the knowledge of the original owner of the mark, his consent, if implied at all in the knowledge of such use, can be revoked at any time: *Gillott* v. *Esterbrook*, 47 Barb. 471.

In relation to what constitutes an infringement, it is settled that "The whole trade-mark need not be pirated:" *Ibid.* 469.

"An injunction ought to issue whenever the design, either apparent or proved, is to impose on the public, and the imitation is such that the success of the design is a probable or possible consequence: *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. 607.

"If the wholesale buyer, who is most conversant with the marks, is not misled, but the small retailer or the consumer is, the right of action must exist:" *Clark* v. *Clark*, 25 Barb. 79.

"It is not necessary that any proof should be made of any one having been deceived, but the court will examine the two things, and see if they are not calculated to deceive." When there is a strong resemblance the court will presume it is not fortuitous, but that it was intentional with a view to mislead purchasers: *Eddleston* v. *Vick*, 23 Eng. Law & Eq. 56-4.

Nor is it necessary that the one infringing upon the trade-mark should be shown to offer the articles as those of the plaintiff's manufacture, for even where the contrary appeared, an injunction was ordered in the case of *Sykes* v. *Sykes*, 3 Barn. & Cress. 543.

And even where the defendant expressly informed the purchaser that the trade-mark placed on the goods was an imitation of the plaintiff's mark, an injunction was granted, on the ground that succeeding dealers might not make a similar disclosure: *Coates* v. *Holbrook*, 3 Sandf. Ch. 586.

It is not necessary that the defendants should be the manufacturers of the goods. They can be enjoined although only commission merchants, selling in the strict line of their business: *Ibid.*

It is not necessary to prove intentional fraud on the part of defendant to warrant equitable relief. It is the probability of deception which justifies the

remedy by injunction: *Coffeen* v. *Brunton*, 4 McLean 519; *Dale* v. *Smithson*, 12 Abb. Pr. 238.

In the collection of the foregoing cases upon the law of trade-marks, we acknowledge our indebtedness to the able brief of S. S. Boyd, counsel in the case to which this note is appended.

A. M.

Supreme Court of Pennsylvania.

HAMMETT v. THE CITY OF PHILADELPHIA.

It is settled in Pennsylvania that the legislature may confer upon municipal corporations the power to assess the cost of local improvements upon the property benefited.

But such local assessments can only be imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be imposed when the improvement is either expressed or appears to be for general public benefit.

The paving of a street, changing a road into a street, and bringing the land fronting on it into the market as building lots, is a local improvement, with special benefits to the land fronting on it, and the cost of such paving may be assessed on the property benefited.

But when a street is once opened and paved, and has thus become a part of the public highways of the city, the *repaving* of it, either with a new and different pavement, or by repairing the old one, is a part of the general duty of the corporation, and cannot be paid for by assessments on the adjoining properties.

WRIT of error to the District Court of the city of Philadelphia. The action was on a municipal claim filed in the following form.

The CITY OF PHILADELPHIA to the use of CHARLES E. JENKINS and JONATHAN TAYLOR, *v.* BARNABAS HAMMETT, owner or reputed owner.	*In the District Court of the City and County of Philadelphia, of March Term* 1868. NUMBER 31.

The City of Philadelphia, to the use of Charles E. Jenkins and Jonathan Taylor, files this claim against Barnabas Hammett, owner or reputed owner, of all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate at the south-west corner of Broad and Poplar streets, for $1007\frac{66}{100}$ square yards of Nicolson pavement, done and laid in front of the premises above described, in Broad street, on the 27th day of November 1867, pursuant to the authority of "An Act supplementary to an Act to incorporate the City of Philadelphia, authorizing the improvement of Broad street in said City," approved March 23d 1866, and of "An Ordinance authorizing the paving of a portion of Broad street with Nicolson Pavement," approved July 5th 1867, at the rate of four dollars per

square yard, or the sum of $4029.04, and for five per cent. on said sum, or the sum of $201.45, as imposed by "A further Supplement to an Act consolidating the City of Philadelphia, *et cetera*, regulating the filing and collection of Municipal Claims," approved March 23d 1866; for which sum of $4230.49, with interest thereon, a lien is claimed against the above described premises, pursuant to divers statutes enacted and provided.

JAMES LYND, Solicitor of the City of Philadelphia.
DAVID W. SELLERS, Attorney for Jenkins and Taylor.

March 26th 1868.

The Act of March 23d 1866, Pamph. L. 299, in sect. 1 thus enacted:—

"That the city of Philadelphia be and it is hereby authorized and empowered and required to occupy Broad street, in the city of Philadelphia, for its entire length, as the same is now opened or may hereafter be opened, and from curb to curb thereof, except as hereinafter provided, for the uses and purposes of a public drive, carriageway, street, or avenue, and to improve the said street, or portions thereof, from time to time, and in whole or in part, with such mode of pavement, paving, macadamizing, gravelling, or other roadway, as may, in the judgment of the Select and Common Councils of said city, be best adapted to and for the uses and purposes aforesaid; and for that purpose the said Councils shall have, and are hereby authorized to enact such ordinances or resolutions, with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting upon said street."

Under the authority of this act the city of Philadelphia contracted with the licensees of the patentee of the Nicolson pavement to pave a portion of Broad street with that pavement, the cost thereof to be paid by the owners. The licensees were authorized to use the name of the city to recover the cost.

A *scire facias* was issued upon the above claim, and the owner of the ground filed an affidavit of defence as follows:—

"Barnabas Hammett, defendant above named, being duly sworn, deposes and says: That there is a defence to the plaintiff's claim, as follows:

"Broad street, at the part described in the claim, in front of the premises owned by this deponent, was, at the time of making the contract for paving the same by Jenkins & Taylor, and of doing the work thereunder for which the claim is filed, well paved with cobble stones in the style universally adopted for years past in this city for the best paved avenues, and such pavement was then in good order and condition, with every probability of it so continuing: it had been laid by the city and her authorized

agents, of their own option, at the time they saw fit, and in such mode and with such material as they chose to select, irrespective of any wish of the then owner of the premises, and the entire expenses thereof both of the materials for the pavement and the laying of the same, were paid by the then owner of the said real estate to the city and her agents at their request, and in obedience to the laws authorizing the pavement of the streets. Afterwards and while (as above stated) the pavement laid by the city at the expense of the owner of the premises was in good order, the city of Philadelphia entered into a contract with said Jenkins & Taylor, under which and not otherwise the plaintiffs did the work for the price of which the said claim is filed and this suit is brought.

"Deponent is advised that the said Act of Assembly is unconstitutional and therefore void, in this: that it delegates to the councils of the city power to impose upon certain persons owners of certain properties facing a public avenue, the entire burden of a general unrestricted work to be undertaken, in the words of the preamble, 'for the uses and purposes of the public and the benefits and advantages which will enure to them,' when those properties had already been subjected to the contribution for paving usual to all other city properties."

The District Court, upon rule, entered judgment for want of a sufficient affidavit of defence, and to that judgment this writ of error was taken.

William A. Porter and *Constant Guillou*, Esqs., for plaintiff in error, contended that no case in Pennsylvania had recognised any power in the legislature to *re*-pave at the expense of the ground which had already borne the expense of paving.

William McMichael and *David W. Sellers*, Esqs., for defendants in error, contended that acts imposing the cost of opening and paving highways, on owners of ground fronting thereon, are within the power of the legislature; and cited most of the cases quoted in the opinion of the court, and the dissenting opinion of READ, J.

They further contended that if there was no constitutional limit on the power, the whole subject-matter was one of public policy for the legislature, and not for the courts; and that if the

power was conceded, the reason for its exercise was not reviewable anywhere. That in a former case this court had declined to allow a similar averment that municipal work was wholly for public uses to defeat the charge against the individual: *City* v. *Tryon*, 11 Casey 401.

The opinion of the court was delivered by

SHARSWOOD, J.—It may be considered as a point fully settled and at rest in this state, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. It is a species of taxation; not the taking of private property by virtue of eminent domain. It was decided in *McMasters* v. *The Commonwealth*, 3 Watts 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and assessed upon others in the neighborhood improved in value thereby. It is there assumed, as a well-settled principle, employing the words of Chancellor WALWORTH in *Livingston* v. *New York*, 8 Wend. 85, that when any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement and in proportion to the supposed benefit received by each. The conclusion seemed logically to follow; for, if a county, district, or town can be assessed for a public improvement on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right. This doctrine is again asserted in *Fenlon's Petition*, 7 Barr 173; and in the subsequent case of the *Extension of Hancock Street*, 6 Harris 26, the constitutionality of such an exercise of the taxing power was declared to be no longer an open question.

On the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water-pipes, in proportion to their respective fronts, has been repeatedly recognised, and the liens for such assessments enforced: *Pennock* v. *Hoover*, 5 Rawle 291; *The Northern Liberties* v. *St. John's Church*, 1 Harris 104; *The City* v. *Wistar*, 11 Casey 427;

The Commonwealth v. *Woods*, 8 Wright 113; *Magee* v. *The Commonwealth*, 10 Id. 358; *Wray* v. *The Mayor, &c., of Pittsburgh*, Id. 265.

These cases all fall strictly within the rule as originally enunciated—local taxation for local purposes—or, as it has been elsewhere expressed, taxation on the benefits conferred, and not beyond the extent of those benefits. There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, everything in which is "excepted out of the general powers of government, and shall for ever remain inviolate." There is no case to be found in this state, nor, as I believe, after a very thorough research, in any other—with limitations in the constitution or without them—in which it has been held that a legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation. That can only be the consequence of attainder for crime, and not even then to its full extent, for there can be no forfeiture of estate to the Commonwealth except during the life of the offender. It is well remarked by Chief Justice ROBERTSON, of Kentucky, under a constitution without restraint on the legislative power of taxation: "An exact equalization of the burden of taxation is unattainable and Utopian. But, still, there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. * * * * * The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue of the whole Commonwealth. Such an exac-

tion, by whatever name the legislature might choose to call it, would not be a tax, but would, undoubtedly, be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, and without retribution of the value in money:" *Lexington* v. *McQuillan's Heirs*, 9 Dana 513. "A legislative act," says Chief Justice BEASLEY, of New Jersey, "authorizing the building of a public bridge, and directing the expenses to be assessed on A., B., and C., such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use:" *The Tidewater Co.* v. *Carter*, 3 C. E. Green 518. "The whole of a public burden," says Chief Justice BLACK, "cannot be thrown on a single individual under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An Act of Assembly commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order, or decree:" *Sharpless* v. *The Mayor of Philadelphia*, 9 Harris 168. It is said that the line of distinction between the right of taxation and the right of eminent domain is clear and well defined. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by right of eminent domain, is taken not as the owner's share or contribution to a public burthen, but as so much beyond his share: *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst. 419. It has been said by Judge FIELD, of California, now on the bench of the Supreme Court of the United States, that "money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it, in advance:" *Burnett* v. *Sacramento*, 12 California 76. I am not able, and do not feel disposed, to enter the lists upon such a ques-

tion, but it does seem to me that there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity; as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations, or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge RUGGLES confines the right to exact money by virtue of the eminent domain, to the case where it is for the use of the state at large in time of war: *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst. 419. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it, prevents its being restrained by any limitations as to either subject or occasion. In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or a taking of private property for public use without compensation—in any aspect, it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sovereign breaks open the strong-box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation. That clause in the Declaration of Rights is, indeed, the sheet-anchor of private property, the security of which against the government, as well as all others, is intended in the 1st section of the 9th article: "All men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." The dollar which a poor man has earned by the sweat of his brow—the fortune which a rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against want in sickness

or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him, except for the necessary purposes of government by equal and just taxation. It is none the less so if it be the act of the hydra-headed monster, a numerical majority, or that of a single autocrat. It is the solemn duty of the judiciary, under our Constitution, to guard and protect this right of property, as well from indirect attacks under any specious pretext, as from open and palpable invasion. "There being," says Chief Justice MARSHALL, of Kentucky, "no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secures equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination, under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. * * * * This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object:" *Cheany* v. *Houser*, 9 B. Monroe 341.

It may be said that *Sharpless* v. *The Mayor of Philadelphia*, 9 Harris 147, and *Kirby* v. *Shaw*, 7 Id. 258, are irreconcilable with the reasoning employed in this opinion. As to the first of these cases it is now practically unimportant, because it has been in effect reversed by the 7th section of the 1st amendment of the Constitution of 1857. It has been seen that it recognises that there are limits to the taxing power such as are here contended for; and the only doubt can be whether the rule was rightly applied. As to *Kirby* v. *Shaw*, although a case on the very verge of the principle which is established—local taxation for local purposes—and there are some generalizations in the judgment as pronounced by Chief Justice GIBSON by far too broad, yet ultimately it is put on the ground of peculiar benefit. "The advantages of a county town," says he, "are too well appreciated not to make every village use all its exertions to have a court-house provided for its benefit and convenience. Without a court-house to replace the burnt one, Towanda could not have remained the

seat of justice; and as its inhabitants profited by, not only the disbursements of the tax among them, but a permanent increase of their business and an appreciation of their property, they were morally bound to contribution. It was for the legislature to fix the proportion, and we have neither a right nor a disposition to question their justice." Here, too, the only real question would seem to be as to the application of the principle. *Kirby* v. *Shaw* has been since followed by this court in the case of the South Street Bridge, *The City of Philadelphia* v. *Field et al.* (July 2d 1868), a judgment in which the Chief Justice and myself were unable to concur.

Assessments on property peculiarly benefited by local improvements, and in consideration of such benefit, are constitutional—thus far have the judicial decisions in this and other states gone, and no further. A few only of the leading cases need be cited. *In the Matter of Canal Street*, 11 Wend. 155; *Hill* v. *Higdon*, 5 Ohio (N. S.) 243; *Stryker* v. *Kelly*, 7 Hill 9, 23; s. c., 2 Denio 323; *Goddard, Petitioner*, 16 Pick. 504; *Lowell* v. *Headley*, 8 Metcalf 180; *Garrett* v. *City of St. Louis*, 55 Missouri 505; *Anderson* v. *Kern*, Draining, 14 Indiana 199; *Sanborn* v. *Rice County*, 9 Minn. 273; *Weeks* v. *City of Milwaukee*, 10 Wisc. 242; *Creighton* v. *Mancon*, 27 Cal. 613; *Tide Water Co.* v. *Coster*, 3 C. E. Green 54, 518. Undoubtedly, the power of taxation is not to be rigidly scanned. Every presumption is to be made in its favor. If the case is within the principle, the proportion of contribution and other details are within the discretion of the taxing power. We may say with Judge PECK of Ohio: "It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike:" *Northern Indiana Railroad Co.* v. *Connelly*, 10 Ohio (N. S.) 159. Or, as in our own case of *Commonwealth* v. *Woods*, 8 Wright 113, where it was held, in an instance unquestionably within the general principle, that the assessment when made in pursuance of law is final and conclusive, and cannot again be reviewed by any other tribunal. On the examination of the cases I have found two in which it was

attempted, though fortunately without success, to make the owners personally liable for assessments beyond the value of their lots, cases which show how dangerous and liable to abuse is this power of special taxation with all the guards which can be thrown around it. *In the Matter of Canal Street*, 11 Wend. 155, the court say: "In this case it is assumed and not contradicted that many individuals will be ruined if compelled to pay the assessments for which they are liable." In *Creighton* v. *Manson*, 27 California 613, the lot in question, before the grading of the street, for which the assessment was claimed, was appraised for revenue purposes at $1400. It was rendered worthless by the grading; yet the attempt was made to make the owners personally liable for its assessment, which was $1989.54.

It remains to apply these principles to the case presented to us upon this record. The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is, therefore, a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.

This case indeed is still clearer than that which I have put of a simple repairing. Broad street, in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved—with cobble-stones—and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in

the increased cost assessed upon him for the paving. Without any pretence that it has been worn out and required to be replaced by another, it was torn up, and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited; though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. It was well said by the court in *The People ex rel. Post* v. *Brooklyn*, 6 Barb. 209: "If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the Common Council; and if their lands are to be so much enhanced in value, they will, by their contributions, enable the authorities to perform the work at a very trifling expense to the city at large." The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure-ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad street, passed March 23d 1866, Pamph. L. 299, for evidence that it is for the general public good, not for mere peculiar local benefit. It states it to be "for the uses and purposes of the public, and the benefits and advantages which will enure to them by making and for ever maintaining Broad street, in the city of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of the said city." Thus we have special taxation authorized for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an

improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary, and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation, Thus far shalt thou go, and no further. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified, by the principles of the Constitution, in doing.

Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit.

There have been several other points raised and discussed on this record, but we are not obliged to consider them; and as the conclusion at which we have arrived that the Act of Assembly of March 23d 1866, so far as it authorizes the councils of the city of Philadelphia "to enact such ordinances or resolutions with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting on said street," is unconstitutional and void, disposes of the whole case, it is unnecessary to discuss any other.

Judgment reversed.

READ, J., dissented.[1]

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[1] We regret that its length prevents our printing the elaborate and able dissenting opinion of READ, J., containing a very full and learned review of the subject of legislative power over local assessments both in England and in Pennsylvania as a colony and as a state.

United States Circuit Court. District of Virginia.

MATTER OF J. D. ALEXANDER, A BANKRUPT.

The *appellate* jurisdiction, properly so called, of the Circuit Court in bankruptcy matters is limited to controversies between assignees and the claimants of adverse interests, and between assignees and creditor-claimants respecting the allowance of claims.

The *supervisory* jurisdiction of the Circuit Court includes all decisions of the District Court, or the district judge at chambers, which cannot be reviewed by appeal or writ of error under the appellate jurisdiction given by the 8th section.

An appeal must be taken in the time and manner prescribed by the act. The regulations as to appeals are regulations of jurisdiction, and cannot be enlarged or restricted by the Circuit or District Courts.

THIS was a petition by B. C. Bagley and John Alexander for the revision of an order of the District Court. It appeared that among the assets of the bankrupt was a tract of land, encumbered by a deed of trust, executed by him on the 24th of December 1864, in favor of William D. Miller, to secure the payment of three bonds, each for $17,000, payable in four, eight, and twelve years from date respectively; that the petitioner Alexander was tenant of the tract under the assignees, claiming a term, which would not expire until January 1st 1870; and that the petitioner Bagley held a judgment which was a lien on the real estate of the bankrupt, and was claimed to be the next lien after the deed of trust.

On the 16th of March 1869, the District Court made two orders, one directing the assignees to sell the land, and the other directing that Miller might become the purchaser, and that the assignees should receive the amount of his bid in the trust bonds at par. The petitioners, as soon as these orders came to their knowledge, prayed an appeal in the name and with the approval of the assignees, and immediately notified Miller and the clerk of the District Court of their appeal.

The time for filing the bond on appeal was extended, by the order of the district judge, until the 18th of April, and on the 14th an order was passed showing that the assignees had filed their bond in the penalty of $10,000. On the 6th of May the assignees informed the counsel for the petitioners that they would not allow the use of their names in the prosecution of this appeal.

The petitioners therefore asked, in consideration of the surprise occasioned to them by this information, and also upon the

ground that an appeal from the order of the district judge in such a case as that before him was not allowed by the act, that the court would give them leave to file their petition now presented and grant them appropriate relief.

Bradley T. Johnson, for petitioners.

Chandler and *C. Dabney*, for respondents.

CHASE, C. J.—The petition invokes the exercise of the jurisdiction of superintendence, conferred upon the Circuit Courts by the 2d section of the Bankrupt Act, which provides that "the several Circuit Courts within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity."

In the consideration of this petition it becomes necessary to ascertain, if possible, the nature and extent of the jurisdiction thus conferred.

It is clear that it must be exercised over proceedings in bankruptcy already pending in the District Court, and it seems to be a reasonable interpretation that it does not extend to decisions of the District Court from which appeals may be taken.

By the 8th section, appellate jurisdiction of such decisions was conferred upon the Circuit Court in four classes of cases: 1st. By appeal in cases in equity decided in the District Court under the jurisdiction created by the act; 2d. By writs of error in cases at law decided in the exercise of that jurisdiction; 3d. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and 4th. By appeal from decisions allowing such claims.

In the first two classes of cases the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class it is given to the dissatisfied creditor; in the fourth to the dissatisfied assignee.

The suits belonging to the first two classes of cases seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the 8th section; for no jurisdiction of cases at

law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the District Court elsewhere than in the 3d clause of the 2d section; though this jurisdiction may be well enough held to be included in the general grant of the 1st section.

If this view is correct, and the jurisdiction of the District Court under the act, spoken of in the 8th section, is the jurisdiction defined by the 3d clause of the 2d, the appellate jurisdiction by appeal and writ of error from decisions in the exercise of that jurisdiction must be regarded as limited to suits at law or in equity, by assignees against persons claiming adverse interests, or by such persons against assignees.

From these premises the necessary deduction is that the appellate jurisdiction, strictly so called, conferred upon the Circuit Courts, is limited to these controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants touching the allowance of claims.

But there must be, obviously, numerous decisions by District Courts and district judges sitting at chambers which are not included in either of these categories.

The order complained of in the petition is an example. It is not a decree in equity; nor a judgment at law; nor a rejection of claim in whole or in part; nor an allowance of a claim.

From this order, then, it is clear no appeal could be taken.

On this point there seems to have been a misapprehension both of counsel and of the district judge; for an appeal was allowed, though not in time; and, afterwards, the time for filing the appeal bond was extended. Of this not ning more need be said now than that the right of appeal, as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeals is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal in any case under the Bankrupt Act from the District Court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given, as required by the 8th section of the act, within ten days after the entry of the decree or decision appealed from; or unless it is entered at the term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed.

This is mentioned here only to correct the misapprehension

which seems to prevail concerning the jurisdiction of this court upon appeals.

Returning, then, to the order mentioned in the petition, and finding it, as already stated, to be one from which no appeal can be taken, the conclusion is inevitable that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all.

It may be said that the superintending jurisdiction does not extend to decisions of the District Court, or of the district judge at chambers; and certainly if it does not extend to both, it extends to neither; for the 1st section of the act gives the same jurisdiction to the district judge at chambers as to the District Court. This construction would limit the revisory jurisdiction of the Circuit Court to that given in the 8th section.

But it is plain that this construction is not the correct one. It would indeed nullify the operation of the most important clause of the 2d section, for it would limit the superintending jurisdiction to the proceedings of assignees and registers; and these seem to be already placed by the 1st clause under the supervision of the District Court.

The better, and indeed, as it seems to me, the only construction which gives due effect to all parts of the act relating to revisory jurisdiction, seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the 8th section; and, on the other, brings within that category all decisions of the District Court, or the district judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section.

The exercise of this general jurisdiction is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulation to the discretion of the court and to the rules to be prescribed by the Supreme Court. As yet, the Supreme Court has prescribed no rule concerning it; nor has this court.

In the case before us its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed. Nor,

on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated.

Leave is given to file the petition, and other questions are reserved until the coming in of affidavits; and in the mean time let further proceedings under the order of the District Court be suspended.

United States Circuit Court. Southern District of Ohio.

WILLIAM H. LANGLEY *v.* LEMUEL PERRY.

The Circuit Court under the 2d section of the Bankrupt Act has jurisdiction to revise the rulings and judgment of the District Court in proceedings in bankruptcy upon bill filed.

A general assignment of all a debtor's property for the benefit of his creditors, is not necessarily a conveyance with intent to delay, defraud, or hinder creditors.

And where such an assignment is made with intent to secure an equal distribution of all the debtor's property among all his creditors, it is not necessarily a conveyance of property with intent to defeat or delay the operation of the Bankrupt Act.

To make such an assignment an act of bankruptcy, it must be made with intent to delay, defraud, or hinder creditors within the meaning of the statute of 13 Elizabeth, or with intent to defeat or delay the operation of the Bankrupt Act.

THIS was a bill in equity, filed by Langley against Perry, to revise and reverse an adjudication of bankruptcy, by the District Court, on the petition of Perry against Langley. The bill set out the proceedings in the District Court. At the hearing it was agreed by counsel, with the assent of the court, that the complainant should amend his bill by making copies of all the proceedings in the District Court, including a bill of exceptions embodying all the testimony, &c., part of the bill, to the end that the whole case of Perry *v.* Langley, in the District Court, from the filing of the petition, should be before the Circuit Court; and thereupon the bill was so amended. The defendant, Perry, demurred.

Langley was a resident of Gallia county, Ohio. Among other creditors, he owed Perry, who brought suit against him, and recovered a judgment at a term of the court commencing on May 27th 1867.

On the 25th of May 1867, Langley, being insolvent, made a general assignment of all his property, in trust for all his cre-

ditors. The assignees accepted the trust, and, on the 25th of May 1867, filed the deed in the Probate Court of Gallia county, under the statutes of Ohio, and proceeded to administer the trust.

On the 17th of July 1867, Perry filed a petition against Langley in the District Court, setting forth the assignment, and claiming that it was made with intent to hinder and delay him in the collection of his debt; and also with intent, by such disposition, to defeat and delay the operation of the Bankrupt Act, and was, therefore, an act of bankruptcy. Langley answered, denying the intent charged. Perry proceeded to take testimony, and it is set forth in the bill of exceptions. Langley offered no testimony, and the case was heard upon the testimony offered by Perry only. The District Court held the assignment an act of bankruptcy, and declared Langley a bankrupt. The opinion of the judge is reported in 7 Am. Law Reg. (N. S.) 429.

This bill was filed to reverse that judgment.

C. D. Coffin, for Langley.

Nash & Lincoln, for Perry.

SWAYNE, Circuit J., held[1]:—

1. That the Circuit Court, under the 2d section of the Bankrupt Act, had jurisdiction in this manner to revise and correct and reverse the rulings and judgment of the District Court in proceedings in bankruptcy.

2. That where a creditor is about to recover a judgment against his debtor in Ohio, and the debtor makes a general assignment of all his property, for the benefit of all his creditors, before the judgment is rendered, such conveyance is not necessarily a conveyance with intent to delay, defraud, or hinder creditors.

3. And where such an assignment is made under like circumstances, with intent to secure an equal distribution of all the debtor's property among all his creditors, it is not necessarily a conveyance of property with intent to defeat or delay the operation of the Bankrupt Act.

4. To make such an assignment an act of bankruptcy, it must be made with intent to delay, defraud, or hinder creditors within

[1] The opinion of Justice SWAYNE was delivered orally; but we are furnished with the above abstract by counsel, and are assured that it is reliable.—EDS. AM. LAW REG.

the meaning of the statute of 13 Elizabeth, or with intent to defeat or delay the operation of the Bankrupt Act. It becomes a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the Bankrupt Law, unless it was meant to be so. Here the proof submitted in the case is clear that the assignment was an honest act, and was not intended either to defraud creditors or defeat or delay the operation of the Bankrupt Act.

The demurrer is overruled; judgment of the District Court reversed, and the cause remanded to the District Court.

In the still later case of THOMAS W. FARRIN *v.* JOHN CRAWFORD, in the same court, Justice SWAYNE affirmed his ruling in the principal case, that an assignment for the benefit of creditors is not, *ipso facto*, an act of bankruptcy; and that the Circuit Court would review the adjudication of the District Court in bankruptcy cases *on the facts* under the supervisory power given by the act. In this last-mentioned case the Circuit Judge reviewed the testimony at some length, and while dissenting from the conclusion of the district judge that an assignment was *per se* an act of bankruptcy, held the transaction in this case to be such an act, because it was not in fact an assignment of all the debtor's property.

These cases, and the foregoing (*Matter of Alexander*, ante, p. 423), are among the few in which the *supervisory* powers of the Circuit Courts have been passed upon by a judge of the Supreme Court, and the liberal construction given to section 2, by the Chief Justice and Justice SWAYNE, renders this a very extensive and important jurisdiction to which perhaps the attention of the profession has not been very much directed.

In *Ex parte O'Brien*, 6 Int. Rev. Rec. 182, the decision of the District Court that a *feme covert* trader is within the Bankrupt Act, and may be declared a bankrupt, was sought to be reviewed on appeal. Justice NELSON, of the Supreme Court, held that the adjudication could not be reviewed on appeal, and his language would appear to favor a very restricted construction of the power granted by section 2; but, in connection with the foregoing decisions, it may be understood as applying only to the form in which the case was then presented.

In the *Matter of John M. Reed*, 2 Bank. Reg. 2, the Circuit Court for the Northern District of Ohio, JJ. SWAYNE and SHERMAN held that the supervisory power was to be exercised by petition and not by appeal.

In *Ruddick* v. *Billings*, 2 West. Jur. 275, Justice MILLER, of the Supreme Court, expressed great doubt if an adjudication of bankruptcy could be reviewed by appeal or writ of error under section 8, but was clearly of opinion that any creditor considering himself aggrieved by the discharge of a bankrupt, could be heard upon petition under section 2.

The whole subject of the jurisdiction of the Circuit Court in bankruptcy, will be found elaborately treated by a very distinguished Ohio jurist, in an article in our pages, ante vol. 7, N. S. p. 641.

J. T. M.

Supreme Court of California.

THE PEOPLE v. TYLER.

Where a statute authorizes but does not compel a party indicted to become a witness in his own behalf, it is improper for the prosecution to comment to the jury on the prisoner's refusal to offer himself as a witness, and the court should when requested charge that no inference was to be drawn against the prisoner from his refusal.

THE opinion of the court was delivered by

SAWYER, C. J. (after disposing of some local points affecting the regularity of the proceedings).—The highly important question in the case arises under the Act of April 2d 1866, entitled "An Act relating to criminal prosecutions," which provides as follows: "Section 1. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. Section 2. Nothing herein contained shall be construed as compelling any such person to testify:" Stat. 1865–6, p. 865.

At the trial the defendant did not avail himself of the right conferred by this act to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact, that the defendant had not testified in his own behalf, and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the court to require the District Attorney to refrain from urging such inference, but the court declined to interfere, and intimated that the law justified the counsel in the course pursued. The District Attorney thereupon continued to urge before the jury, that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted.

At the close of the argument of the case to the jury, the defendant's counsel asked the court to give to the jury the following instruction: "The jury should not draw any inference to the

prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him." The court refused to give the instruction, and defendant excepted. The action of the court in the premises is claimed to be erroneous.

The act under which the question arises, constitutes one of the advances recently made by our legislation in the law of evidence. The principle embraced in the act was first adopted in Maine, we believe, and it has, as yet, so far as we are advised, found a place in the statutes of but few of the states. No decision under similar statutes has been called to our attention, and we are not aware that it has been the subject of judicial construction. The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it is, that it places a party charged with crime in an embarrassing position; that even when innocent, a party on trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet, if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk under the excitement incident to his position of doing worse, by going upon the stand and giving positive testimony. The object of the statute is undoubtedly beneficent. It was designed to afford a party charged with crime, and who must necessarily be cognisant of the true state of the case, an opportunity to controvert or explain any fact that may appear to be against him. It was designed to facilitate the attainment of truth, and to advance the ends of justice, by opening the door under certain wise restrictions consistent with the humane policy of the law, not to compel a party to criminate himself, to all the avenues and sources of truth.

We intimated our approbation of modern progress in the law of evidence in some other particulars in the case of *The People* v. *Jones*, 31 Cal. 573, and we are favorably disposed to the act now under consideration. We so intimated in the case of *The People* v. *Farrell*, 31 Cal. 583. But while we are hopeful that future experience will justify the wisdom of this important change in the

law, we cannot deny that it has, as yet, not been in force sufficiently long to develop its practical workings. In order, however, that the results may answer the expectations of those legislators who adopted it, and the ends of truth and justice be promoted, the statute must be examined, construed, and enforced by the courts, in the same liberal and beneficent spirit that prompted its adoption, otherwise it will become an instrument of wrong and injustice, if not of absolute and intolerable oppression; and in this spirit it is our duty to construe and enforce it.

Upon an examination of the act we find that a person charged with an offence, "shall, *at his own request, but not otherwise*, be deemed a competent witness." It is optional with him, then, whether he shall testify or not; and section 2 provides, that "Nothing herein contained shall be construed as compelling any person to testify." This is but a re-enactment by the statute of that provision of our State Constitution, which says, no person "shall be compelled in any criminal case to be a witness against himself:" Art. I., sec. 8.

At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the people the burden of affirmatively proving the offence alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law, and the statute, give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the people to prove the offence, charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale, and convict him. In this mode he would indirectly and practically *be deprived of the option* which the law gives him, and of the benefit of the provisions of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the *very act of exercising his option* as to going upon the stand as a witness, *which he is necessarily compelled by*

the adoption of the statute to exercise one way or the other, would be, at least, *to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give may be, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference, would be, to violate the principles and the spirit of the Constitution and the statute, and defeat, rather than promote, the object designed to be accomplished by the innovation in question.

We are of opinion, therefore, that the court erred in permitting the District Attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and, especially after what had transpired, in refusing the instruction asked on behalf of defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury. We think such instruction proper in all cases where the defendant desires it.

Judgment reversed, and a new trial ordered.

Court of Appeals of Kentucky.

JOHN D. ELLIOTT, APPELLANT, *v.* HENRY NICHOLS, APPELLEE.

A conveyance to husband and wife and their heirs prior to 1850, constituted in Kentucky, as at common law, an estate by entireties, which neither husband nor wife could sever or make liable for debts as against the other.

The statute of 1850, abolishing the right of survivorship and turning the estate into a tenancy in common, is not retrospective.

Semble, the legislature would have had no constitutional power to divest parties of such right of survivorship acquired by a conveyance in entireties before the passage of the statute.

APPEAL from Nelson Circuit Court.

The opinion of the court was delivered by

WILLIAMS, C. J.—January 3d 1837 Henry Nichols conveyed to his daughter Elizabeth, and her husband, Henry Nichols, certain lands to them and their heirs for ever, which, together with other lands the husband mortgaged, March 9th 1865, to appellants, to secure various specified debts.

Mrs. Elizabeth Nichols died in the year 1861, leaving appellees as her children and heirs at law, who resist the foreclosure of the mortgage on one-half of the land so conveyed by their grandfather to their father and mother, claiming that by the Revised Statutes enacted in the year 1850, the right of survivorship was abolished in such estates, and they held as tenants in common, and therefore by moieties, with a mutual right of curtesy and dower of the survivor in the half of the other, hence they insist that the creditors could only foreclose as to the life interest of their father as tenant by the curtesy in their mother's half of said land. Sect. 14, art. 4, ch. 47, 2 Stant. Rev. Stat. 27, provided that "where any real estate or slave is conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them, but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower with all other incidents to such a tenancy."

By sect. 14, ch. 21, 1 Stant. Rev. Stat. 262, it is declared that "no part of this revision is retrospective unless expressly so declared." And although the language and construction of the enactment relative to such estates might be construed to apply to existing titles, and abolish the right of survivorship between husband and wife, and change the estate from an entirety into one in common, yet as the language is not necessarily expressive of such an intention, we would not hasten to give it a retrospective application, especially in view of a want of constitutional authority in the legislature to so enact. Husband and wife having but one, united legal existence, conveyances to them by the common law which remained in force in this state until our revision of 1850, created a peculiar estate in which both held the entire title, consequently the death of either conferred no new estate or title on the other, but only destroyed the possibility of the decedent's survivorship, in which case that one would have remained the sole

owner. By the common law joint tenants could destroy the right of survivorship by the sale of their respective portions, or by compelling, as they could do, partition, whilst this peculiar tenancy of husband and wife could not be destroyed by the sale of either, nor could partition be compelled by any means known to the law.

This possibility of survivorship, and contingent possibility that the unity between joint tenants would not by any means be destroyed, and the right of survivorship remain, was not such a present vested interest as created or constituted an estate, either leviable by execution, subject to decretal sale, or even vendible and assignable by the tenant himself, but was a mere legal incident to such estate, as a rule of law, which the legislature might abolish. So in *Edwards* v. *Varrick*, 5 Davies 668, the Court of Errors of New York, in able, exhaustive opinions by Judge BEARDSLEY and others, held that when a father had devised two separate tracts of land severally to his sons Joseph and Medcif and their heirs and assigns, but should either die without lawful issue his tract to go to the survivor, and left the two sons executors, with others, and they, as executors, mortgaged Joseph's tract, and Joseph having afterwards died without issue, and subsequently Medcif died leaving issue, who brought ejectment against the mortgagee in possession, it was held that by the father's will Joseph took a determinable, qualified, or base fee in the land primarily devised to him, which was certainly effective as an estate for life, but that no present estate or interest therein passed to Medcif during Joseph's life, his interest being what the law terms a mere possibility of future interest, which, being neither an estate, interest, nor right *in esse*, was incapable of being transferred by grant or assignment at law.

In equity, however, when a party, for a valuable consideration, has sold such a possible interest, he will be deemed the trustee of his vendee, and, when he gets the title, as holding it for him, and compelled to release it to the vendee.

But, as said by the Court of Appeals of Virginia in *Thornton* v. *Thornton*, 3 Randolph 183, all the books agree *una voce* that husband and wife not only cannot compel each other to make partition, but, even if they concur in the wish, they have not the power to sever the tenancy.

It is a sole, and not a joint, tenancy. They have no *moieties.* Each holds the entirety. They are one in law, and their *estate one and indivisible.* If the husband alien, if he suffer a recovery, if he be attainted,—none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi.* There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession, something which he had not before—*the right of the deceased.* But as between husband and wife the survivor *takes nothing from the decedent,* acquires no new title, nor interest, nor estate thereby, but takes by the original conveyance the whole, because invested thereby with the entire estate. The survivor gets the entire estate by virtue of the title being in him, or her, by the original conveyance, but rid of the possible contingency of the other surviving and retaining the estate because likewise so invested in that party. It is plain, therefore, that the husband had the entire title to this land by the original conveyance in the year 1837; so had his wife; and had she survived him she would have retained it, and neither the husband, nor his heirs or assigns, nor the mortgagees, nor even the purchasers under a decretal sale foreclosing the mortgage, would have held against her. Nor can her heirs claim or hold any portion of the land as against the surviving husband or his assigns, but the whole tract should have been ordered to be sold in payment of the mortgage-debts, or a sufficiency for said purpose. As the entire title and estate was vested in both the husband and wife, the legislature could not have divested any portion of the title, and, we must presume, did not intend to do so, but that as a rule of property, and a declaration of the legal effect of such deed subsequently made and the legal rights of the parties thereunder, said statute was enacted. The numerous cases recognising the common-law rules as to such conveyances by this court need not be referred to, all harmonizing as they do with this opinion.

Judgment reversed.